Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GEORGE AUBIN
Petitioner,

v.

UNITED STATES OF AMERICA
Respondents

Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

I. Did the lower courts apply the appropriate legal standard set forth in *Giglio v. United States* or *Kyles v. Whitley* in determining the materiality of favorable evidence not disclosed by the government in violation of the duties enunciated in *Brady v. Maryland*, or did the lower courts improperly apply the more burdensome standard applicable to motions for new trial brought under Fed. Rule Crim. Proc. 33?

II. Was the undisclosed favorable evidence material when considered in light of the appropriate legal standard?

III. Was a hearing necessary to determine the materiality of the undisclosed favorable evidence?

These issues arise in the context of a motion for new trial brought pursuant to Rule 33 of the Federal Rules of Criminal Procedure, subsequent to a conviction for conspiracy, bank fraud and wire fraud. Petitioner George Aubin was convicted of these offenses in connection with a real estate loan made by a savings and loan association. On direct appeal, the conviction was affirmed by the United States Court of Appeals for the Fifth Circuit in *United States v. Aubin*, 87 F.3d 141 (5th Cir. 1996), and Aubin's petition for writ of certiorari subsequent to the direct appeal was denied by this Court in *Aubin v. United States*, ___ U.S. ___, 117 S.Ct. 965, 136 L.Ed.2d 850 (1997). Learning of the government's failure to disclose exculpatory evidence, Aubin then brought his motion for new trial, which motion was denied without hearing to resolve disputed issues of fact by the district court. On appeal

of that denial, the United States Court of Appeals for the Fifth Circuit affirmed the denial, and Aubin now seeks review on certiorari from that decision.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 97-_____

George Aubin, *Petitioner*

v.

United States of America, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, George Aubin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO THE OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit in *U.S. v. Aubin* was issued January 12, 1998, under Docket No. 96-11512, is referenced in the Table of Decisions Without Reported Opinions at 136 F.3d

137 (5th Cir. 1998), and is attached to this petition as Appendix A. The order denying rehearing was filed April 15, 1998, and is attached as Appendix B. The Order entered by the District Court on November 25, 1996, and referenced in the *per curiam* opinion of the United States Court of Appeals, is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was issued on January 12, 1998, and rehearing was denied on April 15, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves:

1. The Fifth Amendment to the United States Constitution, which provides, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law."

2. 18 U.S.C. § 371, which provides in pertinent part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

3. 18 U.S.C. § 1343, which provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both."

4. 18 U.S.C. § 1344, which provided, in pertinent part, at the time applicable to this offense:

> "Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Louis Reese (Reese) owned or controlled a substantial tract of land at the intersection of two of the most heavily traveled freeways in Dallas, Texas. Reese sold land and options on land totaling 41 acres to Haft, Inc. (Haft), a corporation controlled, according to the government, by Reese, James Hague (Hague) and George Aubin (Petitioner), for approximately $14 million. Simultaneously, Haft sold the land to Hague Enterprises, Inc. (Hague Enterprises), for approximately $28 million. Hague Enterprises, according to the government, was controlled by the same three individuals.

Jarrett Woods (Woods) was the chief executive officer, the sole shareholder and a director of Western Savings Association (Western). Western loaned approximately $31 million to Hague Enterprises, secured by the 41 acres and with Hague's personal guaranty. Western also received a substantial interest in any future profits from the development or resale of the property, thereby becoming a joint venturer in the transaction. The value of the land, as substantiated by appraisals conceded at trial by the government to have been properly obtained, exceeded the loan amount. Woods, Reese, Hague and Petitioner all anticipated enormous profit from development and sale of the Dallas property, and anticipated no harm to Western from the transaction.

The profit earned by Haft from the sale to Hague Enterprises was funded to another corporation, and used to partially fund the purchase of a Kentucky horse farm. The government argued that Petitioner was the principal beneficial owner of the Kentucky property, and that the "land flip" was designed to obtain money for the purchase of the Kentucky property without disclosing the true identity of the beneficiaries of the loan from Western, or the true purpose of the transaction,

i.e., the funding of the Kentucky purchase. The alleged reason for this failure to disclose was the government's claim that regulatory scrutiny would have followed from a loan of this size made from Western to Petitioner, or secured by a Kentucky horse farm. However, the government stipulated at trial that there was no prohibition imposed by the applicable regulations, or the regulators, preventing Western from engaging directly in transactions with Petitioner.

Woods plead guilty to other charges involving his operation of Western, and cooperated with the government in order to receive a reduction in his sentence, providing the primary testimony for the government against Petitioner. However, there was no evidence that Woods was acting for any self-interest in this transaction, but rather he testified he was acting solely for what he perceived to be the best interest of Western. Woods clearly testified that he had complete knowledge of the transactions, and dictated the structure of the deal. Accordingly, nothing was misrepresented to Woods, or other employees and attorneys for Western working with Woods.

Petitioner brought a motion for new trial alleging that the government failed to disclose exculpatory evidence, which motion was denied without hearing by the district court, which denial was affirmed by the court of appeals.

HOW THE QUESTIONS PRESENTED WERE DECIDED BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the denial of the Petitioner's motion for new trial because the court's review "discloses no reversible error...for essentially the reasons stated by the district court." *United*

States v. Aubin, No. 96-11512 (5th Cir. 1998)(Appendix A). Thus, the court of appeals essentially adopted the opinion of the district court. The district court denied the motion finding the alleged undisclosed favorable evidence was not material.

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should review the determination of the United States Court of Appeals for these reasons:

(1) The decision of the United States Court of Appeals fails to recognize the distinction between the legal standard appropriate for determining materiality in the case of a motion for new trial alleging favorable evidence newly discovered from a neutral source and a motion alleging favorable evidence known to the government but not disclosed in violation of the obligations imposed by *Brady v. Maryland* and/or involving the use of false testimony by the government, thus deciding an important federal question in a way that conflicts with the relevant decisions of this Court.

(2) The decision of the United States Court of Appeals interprets and applies the standard for determining materiality of favorable evidence undisclosed by the government and the necessity for a hearing to determine such materiality in a manner inconsistent with the decisions of other courts of appeals.

I. Did the lower courts apply the appropriate legal standard set forth in *Giglio v. United States* or *Kyles v. Whitley* in determining the materiality of favorable evidence not disclosed by the government in violation of the duties enunciated in *Brady v. Maryland*, or did the lower courts improperly apply the more burdensome standard applicable to motions for new trial brought under Fed. Rule

Crim. Proc. 33?

The failure by the prosecution to disclose evidence favorable to a defendant violates due process where the evidence is material either to guilt or to punishment. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 481 (1985); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Explicitly stated in this rule is the requirement that the evidence be material to either guilt or punishment. In order to define "material" in this context, the Court has developed at least three standards.

The first, and least burdensome standard to a petitioner, is the standard applicable when the prosecutor has made use of perjured or false testimony, and the falsity of the testimony was known or should have been known by the prosecutor. In that situation, a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Giglio, supra*, 405 U.S. at 154; *Bagley, supra,* 473 U.S. at 678.

The second standard is applicable in the situation of the government's failure to disclose exculpatory evidence, but such evidence does not establish false testimony used by the government at trial. In such a situation, materiality is shown when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, and a reasonable probability of a different result is shown when confidence in the outcome of the trial is undermined. *Bagley, supra,* 473 U.S. at 682; *Kyles, supra,* 115 S.Ct. at 1566. Phrased somewhat differently, "if the

omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. *Agurs, supra,* 427 U.S. at 112.

Finally, the third, and most burdensome, standard is applicable in the case of a motion for new trial alleging evidence newly discovered from a neutral source, not known to the government. In this situation, a new trial is required only when such evidence "probably would have resulted in acquittal." *Agurs, supra,* 427 U.S. at 111.

Petitioner brought a motion for new trial alleging a variety of exculpatory evidence that was clearly in the possession of the government but not produced to the Petitioner[1] in violation of the government's *Brady* obligations. This newly discovered evidence included:

(1) Minutes of the meetings of the board of directors of the institution establishing that the board acted only to ratify loans after they had already been made.

(2) A 1984 report of examination by state authorities setting out the facts of the loan transaction at issue, together with a response by the board of directors of the institution defending the actions taken by the institution.

(3) A 1985 report of examination by federal authorities including a conclusion that Woods controlled all actions taken by the board of directors, and that they did not act independently.

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[1]Petitioner had made specific requests for disclosure of some of these records prior to trial.

(4) A 1984 letter from the president of the institution to the federal regulatory authorities stating that the regulators were conducting an inquiry into loans at the institution involving Reese.

(5) Evidence of a test appraisal by the federal regulatory authorities in 1985 or 1986, substantiating the value of the collateral.

(6) Testimony by the appraiser who performed an appraisal of the collateral prior to the funding of the loan that he had made a statement to the FBI, prior to trial, that Petitioner had not bribed him regarding the appraisal, and that an FBI investigation into an alleged bribe had been conducted and had produced no evidence of a bribe.

The district court denied the motion, without hearing. Petitioner submits that the order of the district court establishes that the court applied the most burdensome standard in weighing the claims made, by requiring that Petitioner prove that the evidence probably would have produced an acquittal. The order entered by the court of appeals merely recites that the court found no reversible error, and affirmed the judgment for "essentially the reasons stated by the district court." Accordingly, the court of appeals adopted the standard of materiality applied by the district court.

A. The lower courts should have applied the standard applicable to the use of false testimony, *i.e.*, required a new trial if the false testimony could in any reasonable likelihood have affected the judgment of the jury.

Petitioner first sought application of the least

burdensome standard, articulated in *Napue* and *Giglio*, arguing that the government had made use of false testimony. Specifically, Petitioner argued that the government made use of false testimony in two particular instances:

(1) Woods testimony that he did not advise his board of directors (or loan committee) of the true facts of Petitioner and Reese's involvement in the loan because of his fear that they would not approve the transaction.

Specifically, Woods testified at trial as follows:

> Q. How, why is it you wouldn't tell your Board (of Directors)?
>
> A. The Board consisted of several people that even went back to the time whenever I acquired Western, or at the time Gatesvile Savings. They were older people. They had a big, I guess, scare, if you would, from the cease and desist order that had just been negotiated within a few months before that. I did not want them to look at the transaction and perhaps tell me that I couldn't do it or say we can't do it. I wanted to do the transaction. I knew if I went to them and talked to them about it and what the real purpose was, there would be a very high probability that they would not want to do anything that had the potential of incurring any more regulatory scrutiny. I just did not want to talk to them about it.

On direct appeal, Petitioner argued that he could not have defrauded the institution where the chairman of the institution and it's sole shareholder had full knowledge of all relevant

facts. However, the Fifth Circuit Court of Appeals, apparently relying on testimony such as that above, held that Woods' knowledge was not imputed to the institution, stating:

> However, the record indicates that Woods did not have unbridled discretion to make loans; the Western loan committee[2] could veto his decisions, and he was concerned that the loan to Hague Enterprises would not be approved if the committee were aware of the facts. In fact, Woods knew that he could not tell the members of the loan committee the truth about the transaction because they would not want to do anything that might incur regulatory scrutiny. Thus, with respect to loan approval, Woods and Western were separate entities.

United States v. Aubin, 87 F.3d 141, 146 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 965 (1997).

The testimony of Woods that he feared disclosure to his board of directors was essential to the holding of the Fifth Circuit affirming the conviction. However, the testimony was false. The falsity could have been proven by the evidence (i) that the directors staunchly defended the loan even after regulatory criticism in the response to the state report of examination; (ii) the loans were presented to the directors only after they had already been made, as demonstrated by the minutes of the directors' meetings; and (iii) the finding by the federal regulatory authorities in the federal report of

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[2]The loan committee was comprised of Woods and two other employee-directors. Thus, the members of the loan committee were also directors.

examination that Woods exclusively controlled the institution and that the board of directors did not act independently.

The district court found:

> This evidence does not create reason for a new trial. At trial, Woods testified that he was the decisionmaker at Western. This "newly discovered" evidence is not material because it is merely cumulative of the evidence presented to the jury through Woods' testimony....Finally, there is no indication that this evidence would probably produce acquittal at a new trial. (Appendix pp. 7a-8a)

First, the district court ignores the issue of falsity, making no determination of the Petitioner's claim that the testimony of Woods regarding the "very high probability" that the directors would not approve the transaction was false. Second, the district court itself argues that testimony that the directors exercised any independent authority was false. Woods' testimony, set forth above, was that he was concerned that the directors "would not want to do" the loan. The Fifth Circuit opinion on direct appeal rested it's decision upon the fact that the loan committee could veto Woods' decision. Yet the district court denies the motion for new trial because Woods' testimony was that he was the decisionmaker, suggesting that no one ever argued that Woods' decision could be vetoed. As such, the district court decision is inconsistent with the testimony and the court of appeals opinion, and virtually establishes the falsity of the testimony.

(2) The second incident of alleged false evidence presented by the government concerned an affidavit from Reese, an alleged co-conspirator cooperating with the government and a key witness for the government, stating that

Petitioner told Reese that Petitioner had obtained the favorable appraisal on the property collateralizing the loan from the appraisal firm through bribery. Charles Dannis, the appraiser who had prepared the report, however, later testified in a civil deposition that he had been interviewed by the FBI, prior to the criminal trial, and had denied that any bribe had been paid, and that the FBI had investigated the bribery allegation and found no evidence of any bribe.

With respect to this allegation, the district court at least acknowledges the argument that the use of the affidavit without disclosing the interview in which Dannis had denied the allegations or the result of an investigation that could find no evidence to support the allegation might constitute the use of false evidence. However, the district court characterizes the argument as "frivolous" (Appendix p. 9a), and states:

> Reese's affidavit is not in conflict with Dannis's testimony that he has no knowledge of any money being received as a bribe, or that the FBI did not find that money was actually paid. Contrary to Aubin's assertions that the Government had knowledge that the allegations of bribery were false, the evidence merely indicates that the Government did not have evidence to substantiate that bribe money had been paid. Reese's affidavit is itself evidence that at least he was told that Aubin bribed an employee of Crosson Dannis (the appraisal firm) (Appendix p. 9a)

Obviously, anytime a witness testifies under oath, that testimony is some evidence. That would be true in every case where the government sponsors false testimony. The issue is: did the government have good reason to believe that this

testimony was false, but put forth the testimony anyway. In this case, we do know that Charles Dannis, the person signing the appraisal report, denied the bribe to the FBI and that the FBI investigated but could find no evidence to support the allegation of a bribe. Accordingly, the government had substantial reason to believe the allegation to be false. Not only did the government sponsor the false affidavit, but it failed to disclose to the defense the statement from Dannis or the results of its investigation that found no evidence to support the allegation.

If the testimony of Woods is false, or the affidavit of Reese is false, and the government was in possession of the minutes, the examination reports and the testimony of Dannis that showed them to be false, the appropriate legal standard to judge the materiality of that evidence is the standard set forth in *Napue, i.e.,* a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. It is undisputed that the lower courts did not apply this standard in weighing the materiality of the undisclosed evidence.

B. With respect to other allegations made by petitioner, the lower courts should have applied the standard applicable to the governments failure to disclose exculpatory evidence, *i.e.,* a reasonable probability of a different result shown when the suppression undermines confidence in the outcome of trial.

As set forth above, the district court denied petitioner's motion stating that "there is no indication that this evidence would probably produce acquittal at new trial." (Appendix p. 8a) The language used by the district court is specifically that applicable to any motion for new trial based upon newly discovered evidence pursuant to Fed. Rule Crim. Proc. 33. As this Court has stated:

> On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.

Agurs, supra, 427 U.S. at 111. The analysis performed by the district judge and adopted by the court of appeals reflects a very restricted reading of the standard set forth in *Kyles* for determining the materiality of such evidence, essentially equating the standard to the burden placed upon any movant alleging evidence newly discovered from a neutral source. The burden placed upon a movant in the Fifth Circuit is clearly greater than that imposed by other courts of appeal. *Cf. United States v. Frost,* 125 F.3d 346 (6th Cir. 1997); *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996).

II. Was the undisclosed favorable evidence material when considered in light of the appropriate legal standard?

A. The evidence could, in any reasonable likelihood, have affected the judgment of the jury.

As set forth above, a key issue was the question of whether or not Woods had reason to fail to disclose the true facts known to him to his board of directors. Woods testified that he did not disclose to the directors the facts because he was concerned that they would not approve the loan. Had the evidence been disclosed to the defense, Petitioner could have shown (i) that the board did not even consider loans until after

they were closed and funded; (ii) that the facts of the loan were largely made known to the board in the report of examination issued by state regulators, but that the board of directors thereafter staunchly defended the making of the loan in a letter to the state regulatory authorities; and (iii) that the federal regulatory authorities had concluded in their report of examination that Woods had exclusive control and that the directors did not exercise any independent judgment.

In the face of this evidence, the suggestion that Petitioner was aiding and abetting Woods in hiding the true facts from the directors of the institution would have been seriously called into question.

Furthermore, had the evidence disproving the allegation by Reese that the appraisal had been obtained through bribery been disclosed, Petitioner could have impeached Reese with the false statement. While it is true that Petitioner could himself deny the bribe, this denial is always subject to disbelief by a jury. Evidence that the appraiser denied the bribe and that a thorough investigation by the FBI could find no evidence of a bribe would clearly carry much greater weight with a jury. Petitioner could have caused the jury to believe the allegation of Reese to be an outright lie. In such a situation, Reese's credibility would have been severely damaged, if not eliminated. Under the most lenient standard, the evidence was unquestionably material.

B. Even applying the standard articulated in *Agurs, Bagley* and *Kyles,* the evidence was material.

As set forth above, materiality of evidence suppressed by the government is shown when there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different, and a reasonable probability of a different result is shown when confidence in the outcome of the trial is undermined. *Bagley, supra,* 473 U.S. at 682; *Kyles, supra,* 115 S.Ct. at 1566. Phrased somewhat differently, "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. *Agurs, supra,* 427 U.S. at 112. Even applying this standard, the suppressed evidence was material.

(1) As set forth above, the evidence would have undermined the basis of the Fifth Circuit's opinion or direct appeal that Woods' knowledge should not be imputed to the institution.

(2) The letter from the president of Western to the federal regulatory authorities disclosed that those authorities were already investigating loans made by Western to Reese. Had this fact been known to the defense, it could have argued that Woods' real motive was to hide Reese's involvement, and not Petitioner's. This argument could easily have led to the jury determining that Reese, but not Petitioner, had aided and abetted Woods in failing to disclose facts to the directors of Western.

(3) The credibility of Woods and Reese would have been severely undermined. The obligation of the government to disclose favorable evidence to the defense extends to evidence affecting credibility. *Giglio, supra,* 405 U.S. at 154. Woods and Reese were both alleged co-conspirators who cooperated with the government[3], and were the key witnesses

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[3]As co-conspirators cooperating with the government in return for leniency, the credibility of these two witnesses was already suspect. The Tenth Circuit has recently held that the testimony of witnesses who are promised leniency in return for cooperation should be suppressed,

for the government. The examination reports, the minutes of the board meetings and the knowledge of the federal investigation into Reese's loans would have provided a substantial basis for effective cross-examination of Woods. Similarly, the investigation into his loans, the Dannis testimony and the results of the FBI investigation into the bribery allegation would have allowed successful impeachment of Reese.

(4) The test appraisal substantiating the true value of the collateral was also highly material. Petitioner vigorously argued that his conviction of either wire fraud or bank fraud required proof of contemplation of exposure of the institution to either an actual or potential loss. The Fifth Circuit has repeatedly held that an element of such fraud crimes is an intent to injure the victim by exposing it to actual or potential loss. *See, United States v. Beuttenmuller*, 29 F.3d 973 (5th Cir. 1994); *United States v. Schnitzer*, ___ F.3d. ___, 1998 WL 353863, No. 96-20908 (5th Cir., July 2, 1998). In both *Beuttenmuller* and *Schnitzer*, the court reversed convictions for fraud placing great reliance upon the appraisals to establish that the transactions constituted appropriate value for value, and were not sham transactions or otherwise exposed the institutions to any more than the ordinary risk associated with a financial transaction. For instance, in *Schnitzer*, the court stated:

> In fact, because BancPLUS's (the financial institution involved in the transaction) purchase of the Dallas property was a value-for-value

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since the testimony was obtained in violation of 18 U.S.C.A. § 201(c)(2) regarding promises of anything of value to a witness because of testimony. *See, United States v. Singleton*, ___ F.3d ___, No. 97-3178 (10th Cir., July 1, 1998).

> transaction, the evidence indicates that the risk of loss associated with BancPLUS's purchase of the Dallas property was the risk of overpayment inherent in every decision to acquire valuable real estate for value. We therefore also find that the government failed to show that the purchase of the Dallas property exposed BancPLUS to a risk of loss sufficient to support criminal liability for bank fraud. CF. Beuttenmuller, 29 F.3d at 981 (implying that the risk of overpayment in a value-for-value transaction is insufficient to sustain a conviction for bank fraud because this type of transaction is not a "criminal venture").

Schnitzer, supra, 1998 WL 353863 at 14. The district court acknowledged the relevance of the appraisal evidence, but argued:

> Although the appraisal does present some support of Aubin's value-for-value defense presented at trial, it is cumulative of evidence offered at trial, and therefore does not support Aubin's claim for a new trial. At trial, it was undisputed that the property possessed great value, and Aubin produced evidence on this point. In addition, as previously discussed, the Reese affidavit does not state that there was a bribe paid, and Reese testified that the appraisal used to acquire the loan was not fraudulently inflated. The federal appraisal evidence is merely cumulative of evidence offered at trial, and is not grounds for a new trial.

(Appendix p. 11a) The district court holds the evidence is

merely cumulative, finding significant other evidence of "great value" in the property. However, this argument misses the point. Under the *Beuttenmuller* and *Schnitzer* holdings of the Fifth Circuit, the fraud conviction requires a finding that the transaction was a sham, or not value-for-value. Apparently neither the jury nor the judge were convinced as to the accuracy of the pre-loan appraisal, since they convicted petitioner of fraud. When faced with another appraisal, commissioned by the federal regulators themselves, that substantuated the value, confidence in the determination that the loan was not supported by sufficient value is certainly undermined.

The materiality of these items of suppressed evidence must be judged for their cumulative effect, not item-by-item. *Kyles, supra,* 115 S.Ct. at 1567. The lower courts made no effort to consider the cumulative impact of the many items suppressed by the government.

Since the lower courts disposed of petitioner's motion without any evidentiary hearing, this Court should assume that the facts alleged by Petitioner are true as submitted. *Ashley v. Texas,* 319 F.2d 80 (5th Cir. 1963), *cert. denied,* 375 U.S. 931, 84 S.Ct. 331, 11 L.Ed.2d 263 (1963); *Kirkpatrick v. Whitely,* 992 F.2d 491 (5th Cir. 1993).

III. Was a hearing necessary to determine the materiality of the undisclosed favorable evidence?

The district court failed to even hold a hearing to evaluate the materiality of the claimed suppressed evidence. Numerous factual issues are presented by the motion for new trial, and the decision rendered by the district court makes many factual determinations, without the benefit of hearing.

For instance, the district court determined that the Reese affidavit was not in conflict with the testimony of the appraiser preparing the appraisal. The court reaches this conclusion by employing mental gymnastics to argue that the affidavit states that Petitioner told Reese that he obtained the appraisal through bribery; therefore, according to the district court, evidence that no bribe was paid does not conflict with testimony that Reese was told a bribe was paid. (Appendix p. 9a). Obviously, the district court does not suggest why Petitioner would tell Reese he paid a bribe when no such bribe was in fact paid. An evidentiary hearing would have allowed the testimony of Reese and Dannis (the appraiser) to be properly evaluated and the extent of the conflict determined.

Similarly, the district court by implication must have found no conflict between Woods' testimony that he feared disclosing facts to his directors because they might not approve the loans and the fact that directors were not even presented with the loans until after closing and funding, or the fact that the directors staunchly defended the loan even after disclosure in a report of examination. Once more, an evidentiary hearing would aid greatly in determining the falsity of the testimony as alleged by Petitioner.

The district court found the evidence of a test appraisal substantiating the value of the property performed at the request of the regulators to be merely cumulative, and at least implicitly found that the existence of such a test appraisal would not have convinced a reasonable trier of fact that the transaction was "value-for-value" as defined in the Fifth Circuit, under *Beuttenmuller* and *Schnitzer*. How can the district court reach that conclusion without an evidentiary hearing evaluating the accuracy and weighing the persuasiveness of the appraisal?

Furthermore, since no hearing was held, Petitioner has never obtained some of the exculpatory eidence: such as the reports of the FBI investigation into the alleged bribe.

This Court has long recognized the importance of weighing the demeanor of witnesses and not deciding factual issues upon a sterile record. *See, Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Petitioner should have been given the opportunity to present testimony and other documentary evidence relevant to these disputed issues. *See, Townsend, supra,* 372 U.S. at 322.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(713) 236-7789

ATTORNEY FOR PETITIONER

July 14, 1998

APPENDIX

APPENDIX A

U.S. DISTRICT COURT
FILED
JAN 12 1998
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11512
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE AUBIN,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(3:93-CR-057-T)

Before POLITZ, Chief Judge, HIGGINBOTHAM and PARKER, Circuit Judges.

PER CURIAM:*

George Aubin appeals from the denial of his motion for a new trial under Fed.R.Crim.P. 33. His motion to file a corrected reply brief is GRANTED.

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Aubin maintains that newly-discovered evidence, the government's suppression of such evidence in violation of **Brady v. Maryland,**[1] and the government's use of false evidence entitle him to a new trial. He also contends that the district court erred by failing to conduct an evidentiary hearing on his motion. Our review of the record discloses no reversible error. Accordingly, the judgment appealed is AFFIRMED for essentially the reasons stated by the district court.[2]

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1. 373 U.S. 83 (1963).

2. **See United States v. Aubin,** No. 3:93-CR-0057-T (N.D.Tex. Nov. 25, 1996).

APPENDIX B

U.S. DISTRICT COURT
FILED
APR 15 1998
CHARLES R. FULBRUGE III
CLERK
iss'd 4/15/98

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11512
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE AUBIN,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 1/12/98, 5 Cir., _____, _____ F.3d_____)

Before POLITZ, Chief Judge, HIGGINBOTHAM and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the

court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH Cir. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTER FOR THE COURT:

/s/ Henry A Politz

_____

Chief Judge

REHG-4

APPENDIX C

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 25 1996
NANCY DOHERTY, CLERK
By_____
Deputy

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

v. No. 3:93-CR-0057-T

GEORGE AUBIN,
Defendant-Appellant.

ORDER DENYING
MOTION FOR A NEW TRIAL

Before the Court is Defendant George Aubin's Motion for New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure Based on Newly Discovered Exculpatory Evidence. The motion is opposed. After consideration of the motion, response and reply, the Court is of the opinion that the motion should be denied.

The charges against Defendant George Aubin arose out of a scheme to obtain funding from Western Savings and Loan for the purchase of a horse farm in Kentucky. Western was owned by Aubin's friend Jarrett Woods, however, Western could not lend money directly to Aubin because of federal regulatory scrutiny of Aubin's activities. Because of his inability to

borrow the funds directly from Western, Aubin arranged a "land flip" with James Hague and Louis Reese. Reese and others sold a large piece of property near the LBJ and Central Freeways in Dallas, Texas, to Haft, Inc. for $14 million. Haft immediately sold the property to Hague Enterprises for @28 million. Both of these entities were controlled by Aubin, Reese, and Hague. The profit from the transaction was then sent by wire transfer to a corporation set up to purchase the horse farm in Kentucky.

Defendant George Aubin was charged in a five-count indictment. On June 3, 1994, the jury returned a verdict finding Aubin guilty on Count 1, conspiracy to impede or impair the IRS, Count 2, bank fraud, and Count 5, wire fraud.

Aubin appealed his conviction to the United States Court of Appeals for the Fifth Circuit. On October 24, 1996, the Fifth Circuit issued its mandate affirming the judgment and the conviction. Aubin moves for a new trial on the basis of newly discovered exculpatory evidence.

Motions for a new trial based on newly discovered evidence are "disfavored by the courts and therefore are viewed with great caution." *United States v. Freeman,* 77 F.3d 812 (5th Cir. 1996) (citations omitted). To prevail on a motion for a new trial based on newly discovered evidence the defendant must show that (1) the evidence is newly discovered and was unknown to the defendant at the time of the trial; (2) the defendant's failure to detect the evidence was not due to a lack of diligence; :(2;) the evidence is material, not merely cumulative or impeaching; and (4) the evidence would probably produce acquittal at a new trial. *Id.* at 817; *citing United States v. Pena,* 949 F.2d 751, 758 (5th Cir. 1991).

Aubin contends that his is entitled to a new trial based on the following newly discovered evidence: (1) 1984 and 1985 Minutes of the Board of Directors of Western, revealing that the Board had no "loan" authority; (2) recent depositions of outside Directors revealing their complete abdication to Woods of all loan authority and failure to ever challenge a loan that Woods had funded; (3) statements made by appraiser Charles Dannis to the FBI case agent; (4) a Report of Examination for 1984 by the Texas Savings and Loan Department revealing that the allegedly fraudulent trans-

action was understood by regulators and a response demonstrating that the Board of Directors and Loan Committee understood the criticisms, but continued to approve the loans; (5) a suppressed federal test appraisal indicating high value in the LBJ/Central deal; (6) the July 1996 testimonies of Woods, Reese and Hague, and an earlier deposition of Norris Lozano; (7) previously undisclosed correspondence between Western and regulators; (8) Ticor Title records disproving the alleged fraudulence of the second $2 million loan; and (9) plane logs and a statement of Hague's pilot that contradict Hague's testimony regarding his activities and whereabouts during the closing.

I. The Alter Ego Evidence

Aubin contends that his is in possession of newly discovered evidence which disproves the Government's theory at trial that there was a dichotomy between the Board of Directors of Western and Jarrett Woods. Aubin bases this argument on the "discovery" of the Minutes of the Board of Directors of Western, the depositions of several members of the Board of Directors, and the 1985 Federal Home Loan Bank Board exam report which was previously suppressed by the Government.

Aubin argues that the Minutes of the Board of Directors of Western reveal that the Board was without power to approve loans. Aubin contends that this evidence contradicts Woods's testimony that he did not tell the Board about the true participants in the transaction because they would not have wanted to approve any loans that would have attracted more regulatory scrutiny. Aubin also contends that the deposition testimony of outside directors Edwin Powell, Judge McClellan, and Dr. Lowrey and titular Western President Creston Brazzill corroborate his claim that Woods was the alter ego of Western. In addition, Aubin points to a 9185 Federal Home Loan Bank Board exam report as evidence of the alter ego theory.

This evidence does not create reason for a new trial. At trial, Woods testified that he was the decisionmaker at Western. This "newly discovered" evidence is not material because it is merely cumulative of the evidence presented to the jury through Woods' testimony.

In addition, Aubin was in possession of the affidavits of the directors before trial, and chose not to call these directors as witnesses during the trial. In their depositions the directors confirmed the information set forth in their affidavits, and taken as a whole, these depositions do not provide evidence which is exculpatory for Aubin.

Finally, there is no indication that this evidence would probably produce acquittal at a new trial. At best, Aubin may have been able to use what he views as contradictory statements in the depositions of these directors to impeach these directors if he had chosen to call them as witnesses at trial.

Aubin also alleges that the Government suppressed the FHLBB Exam Report, and that this suppression was a violation of his right to due process. *Brady v. Maryland,* 373 U.S. 83, 87 (1963). To prevail on a *Brady* claim the movant must demonstrate that (1) the prosecution withheld or suppressed evidence; (2) that the suppressed evidence was favorable to the defense; and (3) that the evidence was material to either guilt or punishment. *Edmund v. Collins,* 8 F.3d 290, 293 (5th Cir. 1993). Because Aubin has failed to demonstrate that the suppressed evidence was favorable to the defense and that the evidence was material, and not merely cumulative of testimony offered at trial, he has not established a *Brady* claim.

II. The Fraud and Conspiracy Evidence

Aubin contends that he has newly discovered evidence which disproves the Government's theories of fraud and conspiracy. This evidence consists of (1) statements made by Charles Dannis; (2) evidence contained in a 1984 Report of Examination by Texas Savings and Loan regulators; (3) evidence of a test appraisal by federal regulators in 1985; (4) evidence that counsel for Western had knowledge of the nature of the deal and the parties involved; (5) evidence that Western was involved in an inquiry by federal regulators regarding Reese's loans; (6) Ticor Title records that allegedly prove that Western and its directors knowingly accepted the risk of these loans; and (7) evidence that Hague lied in his testimony about shipping a complete set of closing documents to Aubin.

First, Aubin alleges that the Government engaged in "prosecutorial misconduct" by making knowing or reckless use of a false affidavit during a pretrial hearing. Aubin contends that he has newly discovered statements made by Charles Dannis denying Reese's allegations that the Crosson Dannis appraisal had been procured by Aubin through use of a bribe.

To prove a due process violation based on the Government's knowing use of false testimony Aubin must demonstrate that (1) the testimony in question was false; (2) the false testimony was material to the verdict; and (3) the prosecutor knew or believed the testimony to be false. *Westley v. Johnson*, 83 F.3d 714, 725 (5th Cir. 1996).

Aubin relies on Dannis's testimony in a recent deposition for his claim of prosecutorial misconduct. Aubin relies on Dannis's testimony that essentially established that he did not ever receive money from a bribe made by Aubin, and that the FBI did not find evidence that money was ever paid. Dannis's testimony in this March 1995 deposition is not, however, in conflict with the affidavit submitted to the Court.

The Reese affidavit essentially states that Aubin told Reese that Aubin obtained the Crosson Dannis appraisal through bribery. This statement does not, as Aubin alleges, "run directly counter to the *Bourjaily* proffer made by the government in its efforts to convince this Court there was a conspiracy." Reese's affidavit is not in conflict with Dannis's testimony that he has not knowledge of any money being received as a bribe, or that the FBI did not find that money was actually paid. Contrary to Aubin's assertions that the Government had knowledge that the allegations of bribery were false, the evidence merely indicates that the Government did not have evidence to substantiate that bribe money had been paid. Reese's affidavit is itself evidence that at lease he was told that Aubin bribed an employee of Crosson Dannis.

Aubin's claim of prosecutorial misconduct is frivolous. Likewise, Aubin's *Brady* claim on this point fails because he has failed to show that the allegedly withheld evidence was material to his guilt or punishment.

Aubin also claims that the alleged withholding of this statement infringed upon his right to effective cross-examination. The record demonstrates, however, that Reese was efficiently cross-examined regarding his knowledge of the Crosson Dannis appraisal. Because Aubin was aware of Reese's allegations of bribery, he had a full opportunity to cross-examine Reese on the details of his knowledge of the bribe, and about Reese's knowledge, or lack of knowledge of any funds that had actually been paid as a bribe.

Aubin also relies on Dannis's recent deposition testimony as exculpatory evidence which, combined with his other newly discovered evidence, entitles him to a new trial. For the reason set forth above, this argument is without merit.

Second, Aubin contends that he has newly discovered evidence in the form of a 1984 Report by of Examination by Texas Savings and Loan Regulators which demonstrates that the directors of Western knowingly accepted the risk of these loans.

Aubin argues that this report shows that the directors had knowledge of the criticism of the deal by regulators, the land flip, the involvement of Haft, the possible involvement of Aubin, and yet approved a response defending the loan to the regulators, and in addition, ratified additional loans to Hague. The Fifth Circuit has rejected the argument that this report shows that the Texas Savings and Loan Department knew of Aubin's involvement in the transaction, and that there is any evidence that the result of the trial would have been different if he had been in possession of this report before trial. *United States v. Aubin,* 87 F.3d 41, 47 (5th Cir. 1996). Aubin's argument that the post-trial discovery of this report is grounds for a new trial is unconvincing.

Third, Aubin contends that newly discovered evidence reveals the existence of a test appraisal by federal regulators in 1985, and that the existence of this appraisal was not produced to his before trial. Aubin argues that this appraisal supports his value-for-value defense presented at trial, and proves the falsity of Reese's allegation that Aubin bribed Crosson Dannis to obtain a heightened appraisal of the property.

Although the appraisal does present some support of Aubin's value-for-defense presented at trial, it is cumulative of evidence offered at trial, and therefore does not support Aubin's claim for a new trial. At trial, it was undisputed that the property possessed great value, and Aubin produced evidence on this point. In addition, as previously discussed, the Reese affidavit does not state that there was a bribe paid, and Reese testified that the appraisal used to acquire the loan was not fraudulently inflated. The federal appraisal evidence is merely cumulative of evidence offered at trial, and is not grounds for a new trial.

It is also notable that although Aubin claims that this appraisal was suppressed by the Government, and is "newly discovered" evidence, the appraisals to which he refers are referenced in a brief presented by Aubin in the civil proceedings regarding this land deal.

Fourth, Aubin contends that newly discovered evidence reveals that Western's General Counsel, Michael Vaughn, had knowledge of the land flip nature of the deal, and that Western's transactional attorney, Norris Lozano, had knowledge of the actual parties involved in the transaction and of the land flip nature of the deal. This evidence is offered in support of Aubin's argument that he had no reason to believe that Western was being misled with respect to the transaction, and as evidence that there was not fraud.

Aubin's argument fails for several reasons. First, Aubin's presence at the deposition of Norris Lozano in 1992, in which Lozano testified about his knowledge of the transaction, and referred to his 1988 deposition which Aubin now contends is newly discovered evidence. Aubin's presence at that deposition indicates that Lozano's involvement in the transaction is not newly discovered evidence. Second, Lozano's deposition testimony, and Aubin's choice to not call him as a witness in trial indicates that Lozano's testimony is not ground for a new trial as there is not indication that his testimony could possibly provide grounds for an acquittal.

Similarly, Vaughn's recent testimony of his knowledge of the transaction is not grounds for a new trial because it is not material, and there is not indication that it would provide a possible acquittal. Because Hague

testified at trial about Vaughn presence at a meeting where a land flip was discussed, Vaughn's statements that he had knowledge of the use of a land flip is cumulative and is not grounds for a new trial.

Fifth, Aubin argues that newly discovered evidence reveals the Western was involved in an inquiry by regulators regarding Reese's loans at Western. As support, Aubin points to a letter written by Creston Brazzill, dated October 2, 1996, and argues that this letter suggests that Woods and Reese intended to remove Reese from the chain of title for their own purposes, unconnected to Aubin's involvement in the transaction. The Court finds this tenuous argument unconvincing, and has determined that it is clearly insufficient to provide grounds for a new trial.

Sixth, Aubin presents as "newly discovered exculpatory" evidence Ticor Title records which he alleges disprove evidence offered at trial that the $2 million loan was a last minute fabrication to increase the funds available to Aubin to purchase the horse farm The Court fails to see how these records can be labeled "newly discovered" evidence when they were introduced as exhibits at trial.

Finally, Aubin argues that newly discovered plane logs reveal that Hague lied about having shipped Aubin a complete set of closing documents. Aubin's attempts to tie this plane log to the testimony at trial that the Ticor Title representatives were still working at 11 p.m. on the date of closing are unconvincing because there was not testimony that the parties involved in the closing were still present at that time. This evidence could at most have been used for impeachment proposes, and is not material.

III. Conclusion

Aubin presents many forms of allegedly newly discovered evidence as grounds for a new trial. However, the evidence is generally immaterial, and Aubin fails to demonstrate that the evidence would probably produce acquittal at a new trial. *See United States v. Freeman*, 77 F.3d 812 (5th Cir. 1996).

In addition, the Court has determined that Aubin's numerous *Brady* claims and accusations of prosecutorial misconduct are unconvincing. Aubin's motion for a new trial should be denied.

It is therefore ORDERED that the Motion for New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure Based on Newly Discovered Exculpatory Evidence filed by Defendant George Aubin on September 3, 1996, is denied.

Signed this 25 day of November, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge